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SUPREME COURT, U. S.

No. 401

In the Supreme Court of the United States

October Term, 1970

[redacted]

v.

[redacted]

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[redacted]

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

[redacted]

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 461

JEROME TREMONT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the District of Massachusetts, petitioner was found guilty of making, and causing to be made, a false statement in an FHA loan application, in violation of 18 U.S.C. 1010 (IR. 2, 3). On December 22, 1969, he was sentenced to imprisonment for two years (IR. 16). On appeal the conviction was affirmed (Pet. App. A).[1]

[1] Another conviction of petitioner under the same statute and involving some related circumstances is before the Court in No. 389, this Term.

402-898—70

The evidence shows that in the spring of 1968 petitioner asked Kenneth B. Smith, manager of the Installment Loan Department of Lynn Safe Deposit and Trust Company, for a bank loan with which to purchase an appliance business called National Sales. Smith explained that this could not be arranged because petitioner lacked investment capital (Tr. 109–110).[2] The two men spoke about obtaining for petitioner FHA loans, which Smith had authority to approve (Tr. 110, 119–120). Petitioner at that time suggested the possibility that Smith might work for him at National Sales (Tr. 116).

On April 12, 1968, petitioner telephoned Smith to say that he thought one Gertrude Collins could qualify for an FHA loan (Tr. 111). He suggested that Smith should "more or less, brush over it and not go into any details in reference to the purpose of the loan, or anything like that * * *" (Tr. 112). In Smith's office, petitioner filled out the entire FHA loan application (Gov. Ex. 1),[3] including Item 10 specifying that proceeds of the loan would be used for "Kitchen Remodeling" and "Bedroom Remodeling" (Tr. 113–114). He then left the application with Smith at the bank (Tr. 115–116).

On April 15, 1968, petitioner returned to the bank with Miss Collins, who signed the completed FHA loan application (Tr. 115–116). Miss Collins testi-

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[2] "Tr." refers to the transcript of the trial testimony which is contained in Volume II of the record on file with the Clerk of the Court. Volume II, is in two parts, the second of which is designated here as "(2)".

[3] The exhibits are contained in Volume III of the record on file with the Clerk of the Court.

fied that at that time she intended to use the proceeds "at least partly" for kitchen and bedroom remodeling, as specified in Item 10 (Tr. (2) 11). To get the funds, she executed a promissory note and received from Smith a bank check for $3,500. She then endorsed the check over to Boston Realty Trust (of which petitioner was a trustee) and gave it to petitioner (Tr. (2) 29), who deposited it in his account (Tr. 30–31). Petitioner then drew a number of checks on this account for various purposes unrelated to home improvements. By April 30, 1968, the account was overdrawn $8.21 (Tr. 33–37, 43–44, 66–67; Gov. Exs. 7B, 9).[4]

Petitioner again seeks to have his conviction set aside because the evidence purportedly was insufficient to support the verdict (Pet. 8–10). Specifically, he argues that Miss Collins fully intended at the time she executed the application to use the money for the designated purpose. As the court below properly concluded, however, this contention is not supported by the record: on the evidence presented the jury could reasonably find that Miss Collins did not have any such intent. The case is therefore clearly distinguishable from *Carvahlo* v. *United States*, 307 F. 2d 394, 395 (C.A. D.C.), where the questioned statements in

[4] In the fall of 1968 Miss Collins asked for several estimates for work on her home, none of which related to remodeling the kitchen or bedroom (Tr. 80–82, 87–91). It was not until after the FBI had begun an investigation in May 1969 (about 13 months after the original loan application), that Miss Collins first obtained an estimate on work which related in part to the kitchen and bedroom. Subsequently, some remodeling work was done, but only $50 was spent on the kitchen and no work was performed on the bedroom (Tr. 94–97, 107; Tr. 2–17, 50; Def. Ex. A).

the FHA loan application were found to be true as to the applicant.

2. Moreover, as appropriately noted below (Pet. App. A 15–16), petitioner's own actions in this case were alone sufficient to warrant a finding that he violated the statute. Petitioner does not dispute this, but argues that the indictment failed to apprise him that he might be required to meet proof by the government relating to his own activity, as distinguished from action taken by Miss Collins. Thus, he apparently asserts that there existed a fatal variance between the proof and the indictment. This claim is without merit. As the court of appeals pointed out, "the proof offered by the government did not expand the indictment" (Pet. App. A 16 n. 5). Indeed, petitioner was advised by a bill of particulars that he "took part in furnishing the information appearing in the FHA loan application, including the statements concerning home improvements to be made with the loan proceeds" (Pet. App. A 16 n. 5). In these circumstances, even if there had existed some variance between the indictment and proof, it would not have "affect[ed] the substantial rights" of petitioner, and thus could not be considered to be fatal. *Berger* v. *United States*, 295 U.S. 78, 82; *Haakison* v. *United States*, 238 F. 2d 775, 781 (C.A. 8).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

AUGUST 1970.

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